

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

07-S-0254

The State of New Hampshire

v.

Michael Addison

ORDER ON THE DEFENDANT'S MOTION TO CHANGE THE VENUE OF
PRETRIAL HEARINGS

The defendant seeks to change the location of the pretrial hearings due to potential prejudice arising from media access to him as he enters and exits the courthouse. The State objects. The Court held a hearing on the matter on April 5, 2007. Based on the parties' submissions and applicable law, the defendant's motion is DENIED.

The defendant requests to change the location of pretrial hearings because the Hillsborough County Superior Court North Courthouse does not possess a sally port or similar structure to prevent media access to the defendant as he enters and exits the courthouse. Although the defendant has appeared in court for pretrial hearings unbound and in civilian clothes, the press has taken photographs of him entering and exiting the courthouse in handcuffs and prison clothes. The media has published these photographs several times, some on the front pages of local newspapers. The defendant argues that, following Estelle v. Williams, 425 U.S. 501 (1976) and Deck v. Missouri, 544 U.S. 622 (2005), the

potential for similar photographs being taken and published undermines his right to a fair trial, as the photographs may prejudice the jury pool. Although the media already has taken several of these photographs, the defendant maintains that "the Court should act to prevent the creation of new images which might have an unfairly prejudicial effect."

The State objects, arguing that: (1) the defendant has a right to wear civilian clothes and be free of restraints at trial only; (2) because the media already has pictures of the defendant in prison clothing and with physical restraints, any prejudice resulting from additional photographs would be minimal; (3) a prospective juror would not be surprised to see the defendant being transported in prison garb considering that the media has reported that he is currently held without bail; (4) such photographs do not create presumptive prejudice because jurors need not be wholly ignorant of the case; and (5) additional procedures, such as questions during voir dire and jury instructions, can minimize any prejudice resulting from such photographs.

"It is well established that due process requires that an accused must receive a trial by a fair and impartial jury." State v. Laaman, 114 N.H. 794, 798 (1974) (citation omitted). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503 (1976). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process . . . courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and

beyond a reasonable doubt.” Id. If a practice or circumstance has an inherently prejudicial effect, meaning it “has so tainted the trial atmosphere that it will necessarily result in lack of due process,” the Court must attempt to remediate the prejudice by modifying the practice, or granting a continuance or change of venue. Laaman, 114 N.H. at 798, 801-02. “Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.” Estelle, 425 U.S. at 504.

Inherent or presumptive prejudice may arise from pretrial publicity. “[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). However, “[I]t is the adverse nature of the publicity, not merely its quantity, that is critical in finding presumptive prejudice.” Smart, 136 N.H. 639, 649 (1993) (citing Rideau, 373 U.S. 723, 727(1963)).

Pretrial publicity creates inherent prejudice when there is a “barrage of inflammatory publicity immediately prior to trial . . . amounting to a huge wave of public passion.” Patton v. Yount, 467 U.S. 1025, 1033 (1984) (internal citations omitted). Neither “[e]xposure to inadmissible evidence” or “straightforward factual publicity about a celebrated case” alone are sufficiently inflammatory to cause inherent prejudice. Smart, 136 N.H. at 649, 650.

Inherent prejudice may also result from a defendant being compelled to appear at trial in prison garb and physical restraints. Deck v. Missouri, 544 U.S. 622, 635 (2005); Estelle, 425 U.S. at 504. “[T]he constant reminder of the

accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment," and undermine the presumption of innocence. Estelle, 425 U.S. at 404-05. This is because "once the jury sees the defendant in clothing implying he is a criminal, they may assume he is [one]." Box v. Arkansas, 71 S.W.3d 552, 557 (Ark. 2002). Shackling may be even more prejudicial, because "it suggests to the jury that the justice system itself sees a need to separate a defendant from the community at large." Deck, 544 U.S. at 630, 633 (internal quotations and citations omitted); see also People v. O'Toole, 590 N.E.2d 950, 958 (Ill. App. 1992) ("Seeing a defendant in that condition might suggest to a juror that the judge believes the defendant too dangerous to sit unshackled during trial, thereby perhaps prejudicing the defendant in that juror's eyes.")

The defendant claims that pictures of him in restraints and prison garb as he enters and exits the courthouse for pretrial hearings will undermine the presumption of innocence, and thus the pretrial hearings should be moved to another courthouse where future photographs could be prevented. However, he submits no case, nor has the Court discovered one, where a court has found presumptive prejudice due to a prisoner wearing jail clothes and restraints at a pretrial hearing or during transport to and from the courthouse. Indeed, Deck and Estelle establish that a defendant has a right to be free of restraints and prison uniforms *at trial*. See Deck, 544 U.S. at 630-31; Estelle, 425 U.S. at 404-05. "Neither Deck nor Estelle, or any court in the country for that matter, prohibits transporting a prisoner to a courthouse wearing prison garb or shackles. Any rule to the contrary would be ludicrous." State v. Tommy Y., Jr., 637 S.E.2d 628, 638

(W.Va. 2006); see also Grant v. Jones, 384 S.E.2d 434, 435 (Ga. App. 1989) (“that right [to appear free of shackles and prison garb] has never been extended to a pretrial proceeding conducted by the trial judge with no jurors present, and we decline to do so now”). When jurors or potential jurors see a defendant outside the courtroom in prison garb or shackles, “the situation is psychologically different and less likely to create prejudice in the minds of the jurors. . . . People normally expect to see a prisoner under some restraints in situations where he is able to escape if not in restraints.” State v. Cassel, 180 N.W.2d 607, 612 (Wis. 1970). Thus, “[i]t is not inherently prejudicial to bring a defendant to the courthouse or courtroom in custody as a security measure.” U.S. v. Barger, 931 F.2d 359, 371 (6th Cir. 1991).

Nor does the Court find that the exposure of the jury pool to photographs of the defendant being transported in restraints and prison clothes to and from the courthouse to be presumptively prejudicial. Such pictures are not the sort of “inflamatory, adverse press” required for a finding of presumed prejudice. See Smart, 136 N.H. at 649. In Rideau v. Louisiana, the Supreme Court found that when a local television station repeatedly broadcast the defendant’s filmed murder confession in the county of venue, prejudice to the defendant could be presumed. 373 U.S. at 724, 727. Here, by contrast, while the photograph of the defendant in restraints and prison garb conveys the impression that the defendant is a prisoner, it does not approximate the “spectacle” of a broadcast murder confession as described in Rideau. See id. at 726. “Because television and the media regularly depict criminal defendants in handcuffs, . . . viewing a

defendant in handcuffs can no longer be regarded as having a shocking effect on a prospective juror's sensibilities." O'Toole, 590 N.E.2d at 958. The 10th Circuit came to a similar result in United States v. McVeigh, finding that "mere television images of the defendant in prison garb being led through an angry crowd do not come close to the type of inflammatory publicity required to reach the disruptive force seen [in the Supreme Court cases of] Sheppard, Estes, and Rideau." 153 F.3d 1166, 1182 (10th Cir. 1998); see also Cressell v. Commonwealth, 531 S.E.2d 1, 4, 5-6 (Va. App. 2000) (finding no presumptive prejudice despite "a newspaper photograph of him in a prison uniform, wearing handcuffs and leg irons").

Further, "[t]o be an indifferent juror, under RSA 500-A:22 (Supp. 1973), it is not required [] that the juror 'be totally ignorant of the facts and issues involved.'" Laaman, 114 N.H. at 800 (citing Irvin v. Dowd, 366 U.S. 717, 722-23 (1961)). In this case, the press has reported that the defendant is being held without bail pending trial, and thus the jury pool has already been exposed to the fact that the defendant is incarcerated. "No prejudice can result from seeing that which is already known." State v. Dayutis, 127 N.H. 101, 107 (1985) (citation omitted). Even if the defendant's status as a prisoner had not been publicized, "[g]iven the violent and serious nature of the alleged crime in the present case, it should have come as no surprise to the jurors [or potential jurors] that the defendant was in custody." Id. at 106-07 (finding that five deliberating jurors having seen the defendant being led from the sheriff's van in handcuffs, was not prejudicial and did not warrant a new trial). While the pictures may have some

impact on the opinions of potential jurors, “[I]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” Laaman, 114 N.H. at 800 (citation omitted).

During jury selection, the Court will address whether pretrial publicity has impermissibly “tainted” the minds of the potential jurors. See Nelson, 103 N.H. 478, 484 (1961). “*Voir dire* examination serves to protect that right [to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors.” State v. Vandebogart, 136 N.H. 107, 110 (1992) (citation omitted). “Under our system of jury selection, where the questioning of jurors is done by the court and not by counsel, the court owes a special duty to act on its own when counsel has alerted the court to special problems.” Id. A jury instruction concerning the restraint and prison garb of the defendant during transportation to and from the courthouse may also be appropriate. See State v. Gilbert, 121 N.H. 305, 311 (1981). “It must be assumed that rational jurors would understand and follow a proper instruction that handcuffing persons in custody for transportation to and from the courtroom is a reasonable precaution that in no way reflects upon the presumption of innocence or the individual propensities of the defendant.” Wright v. Texas, 533 F.2d 185, 188 (5th Cir. 1976).

Lastly, the Court notes that the press already possesses pictures of the defendant in prison garb and restraints, taken when he was transported from the courthouse after his arraignment. Local newspapers have published these pictures in several articles following that proceeding. While moving the pretrial hearings to a courthouse with a sally port would prevent the press from taking

further pictures, the Court cannot prohibit the media from publication of pictures of the defendant in restraints. Thus, a change of the venue of the pretrial hearings would do little to prevent publication of pictures of the defendant in restraints. Cf United States v. Halderman, 559 F.2d 31, 64 n. 43 (D.C. Cir. 1977) (finding a change of venue "would have only been of doubtful value" considering that publicity about the case was nationwide). Accordingly, the defendant's motion is DENIED.

SO ORDERED.

4/13/07
Date

Kathleen A. McGuire
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Presiding Justice